

J14PPENH

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

18 CR 637 (JSR)

5 KENNY PENA, RICHIE HILARIO,

6 Defendants.

Suppression Hearing
(Resumed)

7 -----x
8 New York, N.Y.
9 January 4, 2019
10:09 a.m.

10 Before:

11 HON. JED S. RAKOFF,

12 District Judge

13
14 APPEARANCES

15 GEOFFREY S. BERMAN,

16 United States Attorney for the
Southern District of New York

17 PETER JOHN DAVIS

18 MAURENE RYAN COMEY

Assistant United States Attorneys

19 KELLEY J. SHARKEY

Attorney for Defendant Pena

20 PATRICK JAMES JOYCE

Attorney for Defendant Hilario

21
22 ALSO PRESENT: HANNAH HARNEY, Paralegal Specialist, USAO
23 FIDEL SANTIAGO, Detective, NYPD
24
25

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Thomas - Direct

1 (In open court)

2 (Case called)

3 THE COURT: All right. Now you can call your first
4 witness.

5 MR. DAVIS: Thank you, your Honor. The government
6 calls Officer Joshua Thomas, your Honor.

7 THE DEPUTY CLERK: Please take the witness stand.
8 JOSHUA THOMAS,

9 called as a witness by the Government,

10 having been duly sworn, testified as follows:

11 THE COURT: Counsel.

12 MR. DAVIS: Thank you, your Honor.

13 DIRECT EXAMINATION

14 BY MR. DAVIS:

15 Q. Where do you work?

16 A. I work at the 30th precinct.

17 Q. And what is your title?

18 A. Police officer.

19 Q. And how long have you worked at the 30th precinct?

20 A. For about two years.

21 Q. And when did you join the New York Police Department?

22 A. January 4th, 2017.

23 Q. Okay. Officer Thomas, I want to direct your attention to
24 August 9th, 2018. Were you working that night?

25 A. Yes, I was.

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Thomas - Direct

1 Q. And what shift were you working on August 9th, 2018?

2 A. I was doing a modified tour. I worked from that night
3 until the next day.

4 Q. And so what day did your shift start?

5 A. On the 9th.

6 Q. And when did your shift end?

7 A. On the 10th.

8 Q. Did you have a partner that night?

9 A. Yes, I did.

10 Q. And who was your partner?

11 A. It was Officer Delia.

12 Q. And were you in uniform or plain clothes?

13 A. I was in uniform.

14 Q. What mode of transportation were you using that night?

15 A. We used a marked patrol car.

16 Q. Who was driving the car?

17 A. My partner, Officer Delia.

18 Q. Okay. Officer Thomas, I want to now direct your attention
19 to approximately 11:50 p.m. on the night of August 9th, 2018.

20 What, if anything, happened at that time during your shift?

21 A. As we was driving southbound on Broadway, we got a radio
22 run that there were shots fired on West 139th Street.

23 Q. And what do you mean by a "radio run"?

24 A. Just that another police officer put over the radio that
25 there were shots fired in the vicinity.

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Thomas - Direct

1 Q. Okay. And where were you driving at the time that you
2 heard that communication?

3 A. Southbound on Broadway.

4 Q. And what did you do right after you heard the shots fired
5 call over the radio?

6 A. We immediately decided to keep on going southbound, and we
7 also heard that there was -- someone else called over the radio
8 come to Riverside Drive; so we turned right onto West 143 to
9 get to Riverside Drive.

10 Q. Around what location did you hear the shots fired?

11 A. It was on West 139.

12 Q. Okay. So what did you do next with respect to the shots
13 fired call?

14 A. We immediately tried to get over to the location where they
15 put it over. We didn't see anyone on West 139; so that's when
16 we made the right on 143 to get to Riverside Drive.

17 Q. And to be clear, when you say the location where they put
18 it over, what location were you referring to?

19 A. It was West 139 Street and Broadway.

20 Q. And so I know you said that you tried to go to the
21 location. How did you get there?

22 A. Well, we was still in the car when everything came over.

23 Q. Okay. And so when you arrived at that location, West 139,
24 what did you do next?

25 A. We immediately made a right because we didn't see anyone on

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Thomas - Direct

1 the corner of 139.

2 Q. And what did you do after you arrived at the corner of 139?

3 A. We went down to Riverside Drive.

4 Q. And what happened next when you arrived at Riverside Drive?

5 A. We still didn't see anyone there; so we decided to go to
6 136, and we made a left on 136 to get to Broadway because, at
7 the time, we also heard another radio run stating that the 26
8 precinct had someone, a suspect in custody on 12th Avenue.

9 Q. Okay. And so after you heard that there was a suspect
10 stopped on 12th Avenue, what did you do next?

11 A. Like I was saying, we went -- we made a left on 136 to get
12 to Broadway, and then made a right on Broadway to get to 133
13 because the only way down to 12th Avenue from Riverside Drive
14 is through 133.

15 Q. And so where did you end up parking your RMP?

16 A. On 12th Avenue and 136, 137.

17 Q. And when you first arrived in your RMP around that
18 location, what did you see?

19 A. We saw a 26 marked RMP, or a marked patrol car, and we also
20 saw that another 26 officer trying to put cuffs on the suspect
21 they stopped.

22 Q. And so after you saw the 26 officer trying to put cuffs on
23 the suspect, what did you do next?

24 A. Me and my partner immediately got out of our marked patrol
25 car and we assisted.

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1 Q. And how did you try to assist?

2 A. Well, the 26 officer already had one cuff on his hand; so I
3 just put the other cuff on his hand as well.

4 Q. And what, if anything, did you notice about the suspect you
5 placed that cuff on, that suspect's clothing?

6 A. He was wearing a yellow and black Pirates jersey and also
7 jean shorts.

8 Q. Okay. And what, if anything, did you do next?

9 A. I did a brief search of his person. I took his wallet,
10 cell phone, money. Whatever he had in his pocket, I took it
11 out, and I put it on the 26 patrol car.

12 Q. And you mentioned a wallet, cell phone and money. Did you
13 find anything else in there?

14 A. Yes, there was also a sock.

15 Q. Okay. And you may have said this, but where did you
16 retrieve those items from on his person?

17 A. From his left pocket.

18 Q. And at the time you pulled the sock from Mr. Pena's pocket,
19 did you know what was inside of it?

20 A. No, I did not.

21 Q. What, if any, interactions did you have with the other
22 suspect being detained?

23 A. I did not have any interaction because we decided to
24 separate them.

25 Q. Okay. And after you searched the first suspect's pockets,

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Thomas - Direct

1 what did you do next?

2 A. I put all his belongings on top of the 26 patrol car, and
3 then we waited for further assistance and for our supervisor to
4 get onto the scene.

5 Q. And so after you waited, what did you do next with respect
6 to the suspect you had detained?

7 A. Well, we -- like I said, we just waited for the supervisor
8 to get on the scene. He was in cuffs, and we were just waiting
9 by the patrol car.

10 Q. Did your supervisor end up arriving on the scene?

11 A. Yes, he did.

12 Q. What happened after your supervisor arrived on the scene?

13 A. He told us to do a good search because he was going back to
14 the 30 precinct.

15 Q. And during that second search -- did you conduct a second
16 search?

17 A. Yes, I did.

18 Q. And what, if anything, did you find during that second
19 search?

20 A. I had found a piece of tissue in his waistband.

21 Q. And just stepping back for a second, we were speaking about
22 your supervisor earlier. Who is your supervisor?

23 A. Lieutenant Reed.

24 Q. And you were saying you found something in the suspect's
25 waistband during the second search?

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Thomas - Direct

1 A. Yes. It was a tissue.

2 Q. Okay. And so after you conducted the second search, what
3 did you do next?

4 A. We decided to put him in one of our precinct's marked
5 patrol cars, and then once he was inside, I decided to go
6 through his belongings to make sure there was nothing else
7 inside of the tissue or the sock or whatever.

8 Q. And what, if anything, did you find?

9 A. I found one round in his sock, and I found what appeared to
10 be drugs in the tissue.

11 Q. When you say one round in the sock, what do you mean by "a
12 round"?

13 A. Well, just one bullet.

14 Q. And did you wear a body cam that night?

15 A. Yes, I did.

16 Q. And how long had you been using a body cam before that
17 night?

18 A. Probably about two weeks to a month.

19 Q. And did you turn your body camera on that night?

20 A. Yes, I did.

21 Q. And when did you turn it on?

22 A. When he was already in custody.

23 Q. And why did you turn it on then?

24 A. Because I felt the need that it was important to have it
25 on.

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Thomas - Direct

1 Q. Okay. Officer Thompson, I'm now going to play what's been
2 admitted into evidence as Government Exhibit 302.

3 MR. DAVIS: Ms. Harney, will you please play
4 Government Exhibit 302, starting at 11:30 on the run time and
5 then pausing at the time stamp in the upper left, where it's
6 32:55.

7 (Video being played)

8 MR. DAVIS: I'm sorry, a brief pause there.

9 Q. Officer Thomas, could you please explain to the Court what
10 was going on at the time?

11 A. At the time, we was waiting for our supervisor to get on
12 the scene. The suspect already had cuffs on, and he was
13 waiting by the 26 patrol cars.

14 Q. And who do we hear speaking on that?

15 A. That was me.

16 Q. And who is the person in front of you, right there?

17 A. It's the suspect with the Pirates jersey.

18 MR. DAVIS: Okay. Ms. Harney, can we please play from
19 11:50 and then pausing at time stamp 33:16.

20 (Video being played)

21 MR. DAVIS: Why don't we pause there.

22 Q. Officer Thomas, who was just speaking?

23 A. Lieutenant Reed.

24 Q. And what was he saying?

25 A. He was saying transfer back to the house, which is transfer

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Thomas - Direct

1 to the 30 precinct, and then he said "good toss, good toss."

2 Q. What did you interpret "good toss, good toss" to mean?

3 A. It's a very thorough search of the person.

4 Q. And why were you doing a good toss?

5 A. To make sure he didn't have anything else on him.

6 MR. DAVIS: Ms. Harney, can you play it from about
7 12:10 to 33:30.

8 (Video being played)

9 MR. DAVIS: Let's pause there.

10 Q. Officer Thomas, what just happened?

11 A. I found the tissue in his waistband and put the tissue in a
12 hat that was on the 26 patrol car.

13 MR. DAVIS: And, Ms. Harney, could you please play
14 from 12:25 to time stamp 34:55.

15 (Video being played)

16 Q. Officer Thomas, what just happened there?

17 A. Well, we put the suspect in the 30 patrol car, and after
18 that point, I just actually searched through the sock and
19 whatever was on the person, and I found a loose round or one
20 single bullet.

21 Q. And who were you speaking to?

22 A. Lieutenant Reed.

23 MR. DAVIS: Okay. Ms. Harney, can we fast forward to
24 15:09, and then we'll play to time stamp 37:21.

25 (Video being played)

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Thomas - Cross

1 Q. Officer Thomas, what just happened there?

2 A. Lieutenant Reed, he came over to me and I showed him what I
3 found in the tissue, and he confirmed that it was drugs.

4 Q. And where did you find those drugs?

5 A. The drugs were in the tissue I retrieved from his
6 waistband.

7 MR. DAVIS: May I have a minute, your Honor?

8 THE COURT: Yes.

9 MR. DAVIS: No further questions.

10 THE COURT: Cross-examination.

11 CROSS-EXAMINATION

12 BY MS. SHARKEY:

13 Q. Good morning, Officer.

14 A. Good morning.

15 Q. Were you one of the many who had New Year's Eve duty?

16 A. Not -- no. I worked, but not by the ball.

17 Q. My name is Kelley Sharkey.

18 A. Nice to meet you.

19 Q. Officer, you testified on direct examination that at
20 approximately 11:50 on August 9th, you heard shots as you were
21 traveling southbound on Broadway, right?

22 A. No, I didn't hear the shots. It came over the radio that
23 there were shots fired.

24 Q. Okay. And how long did it take you to get to 139th from
25 when you first heard that run?

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Thomas - Cross

1 A. I'm not sure. I wasn't paying attention to the time.

2 Q. Well, how quickly, in retrospect?

3 A. Probably about five minutes.

4 Q. It took you five minutes to get to 139th from where you
5 were?

6 A. Yes.

7 Q. Okay. Now, where were you when you first heard that shots
8 were fired?

9 A. We were already going southbound on Broadway by West 145
10 Street.

11 Q. Okay. Now, there were a lot of calls put over concerning
12 this event, correct?

13 A. Yes.

14 MS. SHARKEY: And, Judge, with the government's
15 consent and stipulation, I'd like to enter into evidence at
16 this point a copy of the radio runs that night.

17 MR. DAVIS: Can we note for the record what the
18 stipulation is as to this document?

19 MS. SHARKEY: The stipulation is that it's a business
20 record kept in the normal course of business, made close in
21 time to the event, and the government and I have discussed this
22 and they agree to that stipulation. And I'd like to hand it to
23 the witness to ask my further questions.

24 THE COURT: All right. Do you have a copy for the
25 Court?

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Thomas - Cross

1 MS. SHARKEY: I do.

2 MR. DAVIS: And, Judge, may I clarify the stipulation?

3 This is a business record kept by NYPD. It's a record of --

4 it's maintained by 911 operators on the night in question.

5 MS. SHARKEY: Agreed.

6 THE COURT: Okay. What are you marking this as?

7 MS. SHARKEY: Defense Exhibit, I think it's B. I

8 think had previously marked something but didn't enter it into

9 evidence; is that right?

10 THE COURT: All right, received.

11 MS. SHARKEY: Thank you, Judge.

12 (Defendant's Exhibit B received in evidence)

13 BY MS. SHARKEY:

14 Q. Detective, I'm handing you a copy of the sprint report

15 concerning this event maintained by 911, and I'm just going to

16 ask you to look at it for a second, and then I have some

17 questions for you.

18 (Pause)

19 Did you have a chance to look at that, sir?

20 A. Yes.

21 Q. So prior to that brief interruption, I had asked you about

22 the traffic on the radio run, right?

23 A. Yes.

24 Q. And there were a number of descriptions of the shooters put

25 over the airwaves, correct?

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Thomas - Cross

1 A. Yes.

2 Q. And with the Court's permission, you can refresh your
3 recollection and look at that document, but would it be
4 accurate to say that one description was a perp male wearing a
5 white shirt and a second male wearing a red shirt?

6 MR. DAVIS: Objection, your Honor. I would just ask
7 that counsel clarify whether she is asking whether Officer
8 Thomas remembers this at the time that he was -- on August 9th,
9 or now having looked at the defense exhibit.

10 MS. SHARKEY: Sure, I have no objection to that.

11 THE COURT: All right. Well, first of all, the
12 exhibit is in evidence; so, therefore, you can point him to
13 something specific and then ask him, does that refresh your
14 recollection of X, Y or Z.

15 MS. SHARKEY: Okay.

16 BY MS. SHARKEY:

17 Q. Officer, I'd ask that you look at Defense Exhibit B and
18 look at 8-9-2018, 234507.

19 A. Okay.

20 Q. 2345, I'm sorry, 42.

21 A. 42?

22 Q. Yes, sir. Good?

23 A. Yes.

24 Q. Does that refresh your recollection that you heard that a
25 female caller saw the Police Department going the other way and

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Thomas - Cross

1 that the perps just ran inside a building across the street
2 from 626 Riverside?

3 A. I don't remember that.

4 Q. Do you remember -- directing your attention to the next
5 line -- that two descriptions of the perps were a perp male
6 wearing a white shirt and a perp male wearing a red shirt?

7 A. I do not remember that.

8 Q. Okay. Do you remember -- going down to line 234649 -- that
9 you were looking for two males wearing masks?

10 A. I do not remember that either.

11 Q. And, Officer, going down to line 234929, do you remember
12 that there was a radio run put out that the perps ran in a
13 building on the corner of Riverside across the street from
14 building 626?

15 A. I do not remember that either.

16 Q. Okay. Now, you testified on direct examination, sir, that
17 you searched Mr. Pena when he was in custody, correct?

18 A. Yes.

19 Q. And you testified on direct examination that you arrived on
20 the scene as Mr. Pena was being searched; is that correct -- or
21 being cuffed; is that correct?

22 A. Being cuffed.

23 Q. Did you see Mr. Pena walking, with his hands up, towards
24 the police officers?

25 A. No, I did not.

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Thomas - Cross

1 Q. And so the first thing you saw was Mr. Pena bent over a
2 hood of a car being cuffed by a fellow officer, correct?

3 A. I believe so, yes.

4 Q. Now, you testified on direct examination, sir, that when
5 you searched -- withdrawn.

6 When did you first search Mr. Pena?

7 A. When we were able to get the second cuff onto his arm -- or
8 his hand.

9 Q. And how long was that after your arrival on scene?

10 A. Say that one more time?

11 Q. How long after that was your arrival on scene?

12 A. After I cuffed him, or after the search?

13 Q. How much time elapsed from the time you arrived on scene to
14 the time you searched Mr. Pena?

15 A. It couldn't have been more than five minutes.

16 Q. And Mr. Pena was cuffed for the entire time that he was at
17 the location, correct?

18 A. Yes.

19 Q. And he was cuffed when he was inside the RMP on his way to
20 the precinct, right?

21 A. Yes.

22 Q. Now, you testified on direct that you took a wallet, a cell
23 phone, some money and also a sock from his left pocket,
24 correct?

25 A. Yes.

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Thomas - Cross

1 Q. Now, sir, you were -- you met with the prosecutors in this
2 case, prior to testifying, on a couple of occasions before
3 today, correct?

4 A. Yes.

5 Q. And they asked you questions and showed you video about the
6 events that night, correct?

7 A. Yes.

8 Q. And isn't it accurate to say that you told the prosecutors
9 and Detective Santiago -- and I mean AUSA Davis and AUSA
10 Comey -- on December 5th, 2018, that when you first searched
11 his pockets, you only found money and a wallet? Isn't that
12 correct?

13 A. It's possible, yes.

14 Q. Let me show you a copy of something, and it's 350603, and
15 it is the --

16 MS. SHARKEY: I don't have a second copy, Judge. I'm
17 reference --

18 THE COURT: Yes, I have it.

19 MS. SHARKEY: 350603, page 2, line -- the second
20 paragraph, which I have highlighted. May I approach the
21 witness?

22 THE COURT: Yes.

23 BY MS. SHARKEY:

24 Q. Sir, read these five lines.

25 A. The ones that's highlighted?

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Thomas - Cross

1 Q. Yes.

2 A. Helped detain --

3 Q. No, no, no. Read to yourself.

4 A. Oh, I'm sorry.

5 Q. That's okay.

6 (Pause)

7 A. I'm sorry, it's hard to read the handwriting.

8 Q. I agree. It's AUSA Davis' handwriting.

9 THE COURT: That's a federal offense, isn't it?

10 MS. SHARKEY: I think so. I think it's obstruction of
11 justice.

12 (Pause)

13 Q. Okay?

14 A. Yes.

15 Q. So isn't it accurate to say that on December 5th, 2019 --

16 THE COURT: No, no, no. December 5th, 2019? Not yet.

17 MS. SHARKEY: Thank you, Judge.

18 THE COURT: This hearing has gone on long enough.

19 Q. December 5th, 2018, you told the two prosecutors present
20 and the detective that when you first searched Mr. Pena, you
21 only found money and a wallet in his pockets; isn't that
22 correct?

23 A. Yes.

24 Q. And, Officer, you testified on direct examination that you
25 turned your body cam on after Mr. Pena was cuffed or before?

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Thomas - Cross

1 A. After.

2 Q. Now, you testified that you were only using the body cam
3 for about two weeks or a month, right?

4 A. Yes.

5 Q. But prior to your using the body cam, you were trained on
6 the body cam, right?

7 A. Yes, I was.

8 Q. And you were trained on how you should wear the body cam
9 and when you should turn the body cam on, right?

10 A. Yes.

11 Q. And that was by the training division of the NYPD, correct?

12 A. Yes.

13 Q. And did that training occur at the academy or in the
14 precinct?

15 A. At the academy.

16 Q. And how many days was that training?

17 A. It was either one or two days; I'm not too sure.

18 Q. And you were directed to turn the body cam on immediately
19 when you were responding to an event; isn't that correct?

20 A. Yes.

21 Q. And that was fresh in your mind at the time that you were
22 working on August 9th, 2018, right?

23 A. Yes.

24 Q. But you did not turn the body cam on, did you?

25 A. No, I did not.

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Thomas - Cross

1 Q. And when you were questioned by the government concerning
2 the body cam that you were wearing, sir, you had been on the
3 scene, with Mr. Pena cuffed, for about a half hour at the time
4 that video was started, right?

5 A. Yes.

6 Q. And from the time you arrived at the scene until the time
7 Mr. Pena was taken away in an RMP was about 50 minutes, right?

8 A. Yes.

9 Q. And Mr. Pena was cuffed the entire time, correct?

10 A. Yes.

11 Q. You had your hand on Mr. Pena the entire time, correct?

12 A. Yes.

13 Q. And when you first arrived at the location, some officers
14 had their guns drawn, correct?

15 A. No.

16 Q. You didn't see anybody with their guns drawn?

17 A. No, I did not.

18 Q. You didn't see Mr. Pena walk down towards the officer that
19 you assisted in putting the cuffs on, correct?

20 A. No, I did not.

21 Q. Okay. Now, when you saw Mr. Pena, he was wearing a black
22 Jersey with bright yellow or gold Pirates lettering, correct?

23 A. Yes.

24 Q. And also, Mr. Pena had sneakers on, correct?

25 A. Yes.

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Thomas - Cross

1 Q. And those sneakers were black with white stripes, correct?

2 A. That, I'm not sure of.

3 Q. Well, you spoke with Police Officer Carlstrom about this
4 event, right?

5 A. Police Officer Castro?

6 Q. Detective Carlstrom, sorry.

7 A. I believe so. I'm not too sure.

8 Q. 3506-02, the bottom paragraph.

9 MS. SHARKEY: May I approach the witness, your Honor?

10 THE COURT: Yes.

11 Q. I'm going to show you a copy of a document, and I'm going
12 to ask that you read the bottom four lines -- it's highlighted,
13 and there are a couple of red stars next to it -- and see if
14 that portion of that document refreshes your recollection as to
15 what you told Detective Carlstrom concerning what Mr. Pena was
16 wearing.

17 (Pause)

18 A. Yeah, I remember the first part.

19 Q. My question is this. Didn't you tell Detective Carlstrom
20 that Mr. Pena was not wearing a hoody or do-rag?

21 A. Yes.

22 Q. And didn't you tell Detective Carlstrom that he was wearing
23 jean shorts with black sneakers with white markings?

24 A. Yes.

25 MS. SHARKEY: Just one second, Judge.

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Thomas - Cross

1 THE COURT: Yes.

2 Q. And, sir, didn't you also tell -- well, withdrawn.

3 You testified on direct examination that when you did
4 this second search of Mr. Pena, 50 minutes after he was
5 detained and arrested and handcuffed, you recovered a piece of
6 tissue from his waistband?

7 A. Yes.

8 Q. Now, on December 5th, 2018, didn't you tell Detective
9 Santiago, Mr. Davis and Ms. Comey, that you found the bag of
10 coke and a round on him, in his sock, in his underwear
11 waistband prior to him getting into the RMP? Do you remember
12 that?

13 A. Yes.

14 MS. SHARKEY: I have nothing further.

15 THE COURT: All right. Any other cross-examination?

16 MR. JOYCE: Just a couple of questions, your Honor.

17 CROSS-EXAMINATION

18 BY MR. JOYCE:

19 Q. Sir, at the time that you were at the location at 135th and
20 12th Avenue, you were paying attention to the man with the
21 black shirt and the gold letters, right?

22 A. Yes.

23 Q. But there was another individual who was in custody as
24 well, right?

25 A. Yes.

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Thomas - Redirect

1 Q. And you knew where that person was located, right?

2 A. Yes.

3 Q. And that person was located with some police officers in a
4 different location from where you were standing, and he was
5 still there when you put the man with the black shirt into the
6 police car, correct?

7 A. I believe so.

8 Q. And just so we're sure -- clear about -- when you arrived
9 at 135th and 12th Avenue, there was approximately ten or 12
10 police cars there, correct?

11 A. When I arrived? No.

12 Q. Before you left, were there ten or 12 police cars there?

13 A. There could have been; I didn't really count.

14 Q. And at some point, there were about 10 or 15 uniformed
15 police officers in that location, correct?

16 A. Yes.

17 MR. JOYCE: I have nothing else.

18 THE COURT: Okay. Redirect?

19 MR. DAVIS: May I have a moment, your Honor?

20 THE COURT: Yes.

21 (Pause)

22 REDIRECT EXAMINATION

23 BY MR. DAVIS:

24 Q. Officer Thomas, do you still have a copy of Exhibit B in
25 front of you, Defense Exhibit B?

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Thomas - Redirect

1 A. Yes.

2 Q. Do you recall being asked about defense Exhibit B on
3 cross-examination?

4 A. Yes.

5 Q. Okay. Before today, have you ever seen Defense Exhibit B?

6 A. No, I have not.

7 Q. Did you see Defense Exhibit B on the night of August 9th,
8 2018?

9 A. No, I did not.

10 Q. Okay. Do you remember, on cross-examination, defense
11 counsel was asking you about your conversations with the
12 government and meetings with the government?

13 A. Yes.

14 Q. Do you recall being asked about your description of when
15 you recovered the sock from Mr. Pena?

16 A. Yes.

17 Q. Did you recall what, if anything, refreshed your
18 recollection about your memory about when you recovered the
19 sock from Mr. Pena?

20 MS. SHARKEY: Objection as to form.

21 THE COURT: Overruled.

22 A. I can continue?

23 Q. Yes, you can.

24 A. Yes. My body cam video that was on, also a statement that
25 I had written out, handwritten out, after everything went down,

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1 and I had got back to the precinct.

2 MR. DAVIS: May I have a moment, your Honor?

3 (Pause)

4 Q. So Officer Thomas, you mentioned a statement that you
5 wrote. When exactly did you write that statement?

6 A. Immediately after I got back to the precinct, after
7 Mr. Pena was already taken away.

8 Q. And when did that occur, was it after -- sorry. When
9 exactly did you write that statement?

10 A. Immediately when I got to the precinct.

11 Q. And what did that statement describe?

12 A. It described everything that I partaked in of that event.

13 MR. DAVIS: No further questions at this time, Judge.

14 THE COURT: Anything else?

15 MS. SHARKEY: No.

16 MR. JOYCE: No, your Honor.

17 THE COURT: Very good. Thank you so much. You may
18 step down.

19 (Witness excused)

20 THE COURT: Does the government rest?

21 MR. DAVIS: The government rests, your Honor.

22 THE COURT: How about the defense?

23 MR. JOYCE: Defense for Mr. Hilario arrests.

24 MS. SHARKEY: Defense for Mr. Pena rests.

25 THE COURT: Very good. All right. I'm going to take

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1 two very short matters that will take about ten minutes. So we
2 will resume with summations starting about ten after the hour.
3 See you then.

4 MR. DAVIS: Thank you, your Honor.

5 (Recess)

6 (Hearing resumed; in open court)

7 THE COURT: Please be seated. All right. Let's hear
8 first from the government.

9 MR. DAVIS: Thank you, your Honor. Would you prefer
10 that I address the Court from the podium or from here?

11 THE COURT: Whichever is your preference.

12 MR. DAVIS: Thank you. Mr. Pena and Mr. Hilario were
13 arrested because of excellent police work by the NYPD. At each
14 stage of this investigation, the NYPD did exactly what the law
15 requires and exactly what a dangerous situation demanded.

16 The defendants' motion should be denied because the
17 officers had probable cause to arrest Mr. Pena and Mr. Hilario
18 at the moment they were stopped at 135th and 12th Avenue.
19 Officer Doheny reported over the radio that suspect's direction
20 of flight that he saw running from the scene of the shooting.
21 He also reported an article of clothing that matched the
22 description of the suspects.

23 Officer Smith heard those reports over the radio and
24 saw, when he arrived at 135th and 12th, the suspects running in
25 the exact direction of flight reported over the radio and

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1 wearing black clothing, which was reported over the radio as
2 well. But the Court does not even need to reach the question
3 of whether probable cause existed at the time that Mr. Pena and
4 Mr. Hilario were initially detained to deny defendants'
5 motions. That's because there was, at a minimum, reasonable
6 suspicion to stop Mr. Pena and Mr. Hilario at that initial
7 stop, when they were first detained while the investigation
8 continued.

9 And we know that the investigation did continue.
10 Twenty minutes after Mr. Pena and Mr. Hilario were first
11 detained, we heard the testimony that Lieutenant Reed viewed
12 the video of the shooting and the robbery. On that video,
13 Lieutenant Reed saw the suspects committing the crime, and then
14 ten minutes after that, Lieutenant Reed showed up at 135th and
15 12th and saw the suspects and identified them as the
16 perpetrators.

17 So whether the Court analyzes this arrest as a
18 probable cause arrest made at the time that the defendants were
19 initially stopped or as a Terry stop, followed by a lawful
20 arrest on probable cause, defendants' motion to suppress the
21 evidence seized from them should be denied.

22 I want to structure my argument today in three parts.
23 I want to first address the probable cause framework for
24 defense motions. I then want to address the Terry stop
25 framework for defendants' motions, and in each section I want

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1 to address the particular items that the defendants seek to
2 suppress. And then, finally, I want to address, as to
3 Mr. Hilario, the spontaneous statement he made while he was
4 being detained and the post-arrest statement he made after his
5 formal arrest.

6 Turning first, your Honor, to probable cause. The
7 officers had probable cause to arrest the defendants the moment
8 they were stopped. Probable cause exists when officers have
9 knowledge of facts and circumstances that warrant a person of
10 reasonable caution to believe that an offense has been
11 committed by the person to be arrested. This is a richly
12 factual inquiry, and here there are a number of facts and
13 circumstances that support probable cause.

14 I want to highlight for the Court eight of those facts
15 and circumstances that provided probable cause at the instant
16 that Mr. Hilario and Mr. Pena were first detained. First, we
17 have the officers putting out over the radio that shots were
18 fired. This was a shots fired call.

19 Second, we have the officers putting out over the
20 radio a location of that shots fired call. The shots fired
21 occurred at 139th and Broadway.

22 Third, we hear Officer Doheny, he testified that he
23 saw a man in a black shirt and a muzzle flash fire the shots,
24 and he testified that he then chased those suspects as they ran
25 westbound on West 139th. And what Officer Doheny put over the

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1 radio was the direction of flight. He first said Riverside
2 Central, Riverside. So now we know where the shots were fired
3 and now we know the direction of flight, Riverside Central,
4 Riverside.

5 But Officer Doheny gets even more specific than that
6 because after he says Riverside Central, Riverside, he said:
7 They're running towards 12th; they're running towards 12th.
8 Now, embedded in that communication are three important facts
9 about the suspects. First, Officer Doheny said "they're,"
10 meaning there's more than one. Second, he said "running."
11 That's a mode of transportation. Third, he said "they're
12 running towards 12th"; so now we have a further direction of
13 flight. You can trace it from 139th and Broadway to Riverside
14 to 12th.

15 But Officer Doheny continues. He says "black shirt,
16 running down 138th;" so now we know even more about the
17 suspects. Their direction of flight is even more exact because
18 we know 138th is south of 139th; so they're running from 139th
19 and Broadway to Riverside to 12th, now south. And we know that
20 there's a black shirt involved, that one of the suspects is
21 wearing a black shirt.

22 Finally, the last description of the direction of
23 flight that Officer Doheny puts out over the radio is he says
24 he ran down 12th. So now we know that the suspects are running
25 down 12th. And so finally, now we hear the other end of this.

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1 So Officer Doheny is putting this out over the radio.

2 Who hears this? Officer Smith hears it, and Officer
3 Smith testifies that he heard these transmissions about the
4 direction of flight of the suspects, and he went to where? To
5 135th and 12th. And he testified exactly why he went to 135th
6 and 12th. He says he went there because of the direction of
7 flight that the officer put over the radio and because that
8 location might be a route that any suspect might potentially
9 flee.

10 So Officer Smith hears that information, goes to where
11 he thinks the suspects are running based on not only Officer
12 Doheny's exact direction of flight provided, but also his
13 experience as a police officer. And what does he see next?
14 Within three minutes of the shots fired call, Officers Smith
15 sees two suspects running down 12th Avenue towards 135th and
16 12th and wearing dark clothing, black shirts. Officer Smith
17 saw these suspects running exactly where he would expect
18 someone to run when they were fleeing.

19 And so, your Honor, considering all of these facts
20 together, that these suspects were running in the middle of the
21 night on August 9th, in the exact direction of flight put out
22 over the radio, three minutes after the shots were fired and
23 matching the articles of description of the clothing, a person
24 of reasonable caution would have thought that a crime had just
25 been committed by these suspects. And that conclusion that

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1 probable cause existed at that moment is dispositive as to the
2 defendants' motions to suppress any physical evidence found on
3 him.

4 That's because as to the clothing that they were
5 wearing, that was properly seized either incident to arrest or
6 as part of an inventory search. And as to the items found on
7 Mr. Pena's person, those were seized proper to an incident to
8 an arrest based on probable cause.

9 But, your Honor, importantly, you don't have to reach
10 the question of whether probable cause existed at the time of
11 the arrests, at the time of the initial detention to deny
12 defendants' motion to suppress the physical evidence. That's
13 because all of those facts and circumstances that we just
14 covered certainly surpass the minimal bar required for a Terry
15 stop. They provided the reasonable suspicion that crime was
16 afoot, and that allowed the officers to stop the defendants, to
17 stop Mr. Hilario and Mr. Pena, while the investigation
18 continued.

19 And that investigation did continue. Twenty minutes
20 later Lieutenant Reed viewed a surveillance video of the
21 shooting itself, and he was able to put out over the radio a
22 description of Mr. Pena. And after that, ten minutes after
23 that, Lieutenant Reed showed up at 135th and 12th and
24 identified the suspects.

25 So once we're in a Terry stop framework, your Honor, I

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1 think the question becomes -- and this is, again, in the
2 alternative -- the question becomes kind of timing. When did
3 the Terry stop, if at all, mature into a formal arrest, versus
4 when the did the police have probable cause to effect that
5 arrest?

6 And what's good about the record here is that we can
7 put times on this. We can put times on it because we can start
8 with the transcripts in Government Exhibit 101. We hear at
9 three minutes and 20 seconds into that transcript, Officer
10 Smith says he has one male stopped. Then we hear over the
11 radio, 22 minutes and 50 seconds into that transcript,
12 Lieutenant Reed put out a description of Mr. Pena when -- of
13 the clothing that he was wearing.

14 And we heard Lieutenant Reed testify that when he was
15 making that radio communication about that description, he was
16 watching the surveillance video. So that means from the time
17 of the initial stop to the time where Lieutenant Reed is
18 watching the video of the suspects committing the crime, it was
19 less than 20 minutes there.

20 But we can go one step further than that by looking at
21 Officer Smith's body cam. At the beginning of Officer Smith's
22 body cam, which is Government Exhibit 301, we see Officer Smith
23 having detained Mr. Hilario and in the process of detaining
24 Mr. Pena. About 20 minutes into that, at 1958, we hear, over
25 the radio, Lieutenant Reed give the description of Mr. Pena

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1 that we were just discussing.

2 Ten minutes after that, at 33 minutes and 45 seconds
3 in Government Exhibit 301, we see Lieutenant Reed for the first
4 time at 135th and 12th. So that means from the start of the
5 stop, which is at zero, the beginning of Government
6 Exhibit 301, to when Lieutenant Reed has done a show-up, after
7 having watched the video, we have a 33-minute stop. So this is
8 a 33-minute investigative detention.

9 I bring up this timing not because -- to set up the
10 framework for the discussion, but the legal inquiry before the
11 Court, when addressing whether time alone can turn a Terry stop
12 into arrest, isn't a bright-line rule. It's not whether it was
13 20 minutes or 30 minutes or 40 minutes or 50 minutes. Instead,
14 the Court asks whether the police were diligently pursuing
15 their investigation during the stop. And on this record, where
16 we have Lieutenant Reed watching a video of the suspects
17 committing the crime during -- within 20 minutes of the initial
18 detention, and then doing a show-up to identify the suspect ten
19 minutes later, I don't think there can be an argument this
20 wasn't a reasonably diligent search by the police and
21 investigation by the police.

22 And one other thing to go to get folded into the
23 probable cause discussion is when Lieutenant -- for Lieutenant
24 Reed, is all the direction of flight, all the Officer Smith
25 testimony and Officer Doheny testimony, that all gets folded

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1 into the probable cause determination that Lieutenant Reed is
2 making, as well as the articles of clothing that Lieutenant
3 Reed viewed when he first arrived at 135th and 12th. He saw a
4 do-rag and a black hooded sweatshirt that were on the path of
5 flight.

6 So I would anticipate that the defense counsel would
7 also argue that this matured into an arrest. If we're in the
8 Terry stop framework, again, we're in the alternative, but if
9 we're there, I would anticipate that the defense counsel will
10 argue that the use of restraints and the number of police
11 officers matured this Terry stop into an arrest before probable
12 cause existed.

13 And on this record, we don't think that has any merit.
14 As an initial matter, the Second Circuit has repeatedly held
15 that the use of restraints is permitted and doesn't turn a
16 Terry stop into an arrest when there is a response to
17 legitimate safety concerns on parts of the investigating
18 officers, and they've also found restraints to be permissible
19 when there is a risk of flight.

20 Here, your Honor, we have demonstrable evidence of
21 both. This is a shots fired call. This wasn't a Terry stop
22 that had nothing to do with a dangerous situation. This was a
23 response to a shots fired on a public street in the middle of
24 the night. So there was immediate danger to society and
25 immediate concern about the suspects being armed.

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1 And even further still, Lieutenant Reed testified that
2 the police officers were looking, continuing to look for
3 another firearm while the suspects were being detained. Now,
4 that's important because it speaks to the danger of having the
5 suspects unrestrained during the time of the investigative
6 stop.

7 And we can go one step further than this, your Honor.
8 Officer Smith testified that after the defendants were placed
9 in the RMP and the decision to arrest them has been made and
10 they were taken away, it was only after that that Officer Smith
11 found the second firearm, which was found along the path of
12 flight of the suspects. And that's important because if they
13 were -- it shows how dangerous this situation was. Imagine if
14 the defendants were not restrained?

15 What I'll say is, the Second Circuit has been clear in
16 a number of cases that it doesn't ask -- it doesn't second
17 guess police officers' reasonable use of restraints, and
18 there's a good reason for that. I mean, here, it's probably
19 very easy to point, look back at this situation where the
20 police did everything correctly and the arrested were effected
21 safely and efficiently and to say, it would have been fine if
22 the defendants weren't restrained.

23 But there was a serious risk of danger here because
24 there was a firearm along the path of flight that the officers
25 hadn't discovered yet, while they were being investigated. So

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1 this situation could have escalated into a dangerous one
2 quickly.

3 But even further, your Honor, not only did we have the
4 risk of danger and weapons associated to allow restraints to be
5 used during the Terry stop, we also had a demonstrable risk of
6 flight because the two suspects were detained fleeing from the
7 scene. They were running. That's Officer Doheny's testimony.
8 That's Officer Smith's testimony, and that, in itself, would
9 justify the restraints because what's the alternative? The
10 alternative is to hold the defendants at gunpoint unrestrained,
11 and that's just not reasonable police conduct.

12 So, your Honor, we don't think that either of those
13 factors could turn this into an arrest before probable cause.

14 And last point on this is just the number of police
15 officers. Again, Lieutenant Reed testified that there was
16 still an ongoing search for a firearm, and whether this -- how
17 many number of police officers were there doesn't turn this
18 into an arrest because it was reasonable, under the
19 circumstances, to have police officers present at the scene
20 responding to a shooting on a public street in the midst of the
21 search for a second gun.

22 So now that we've established the Terry stop
23 framework, I want to discuss how this framework applies to each
24 of the items that the defendants seek to suppress.

25 So as to Mr. Hilario, Mr. Hilario is seeking to

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1 suppress his clothing. Well, that was seized after probable
2 cause was established, at the latest, and so that comes in
3 incident to arrest, or as part of an inventory search.

4 As to Mr. Pena, who had items in addition to his
5 clothing, which the same analysis applies, but in addition to
6 his clothing, there was crack cocaine found on him. That
7 was -- Officer Thomas testified that that was found during a
8 second search, after Lieutenant Reed had decided that they were
9 going back to the precinct. So Lieutenant Reed had probable
10 cause for the arrest at that point. That comes in incident to
11 the arrest.

12 Then Officer Thomas said there was an initial search
13 that he did when he initially arrived at the scene. Even
14 putting aside that there was probable cause at that time to
15 arrest them, just assuming for a second we're in the Terry stop
16 framework, as to those items, they all come in, and this
17 includes the sock with the bullet. It all comes in as
18 inevitable discovery, your Honor, because it's clear that the
19 arrest -- the later arrest was valid and likely to occur.

20 It's actually not likely to occur. We know it would
21 have occurred because we know the items that were seized from
22 Mr. Pena initially, including the sock, wouldn't have anything
23 to do with the probable cause determination to arrest Mr. Pena.
24 It's only after that decision to arrest was made that Officer
25 Thomas discovers the bullet in the sock. So we actually know

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1 this is an incredible strong case for inevitable discovery if
2 we're in this framework as to the sock.

3 Your Honor, in my final part of my argument, I want to
4 address Mr. Hilario's statements and the Miranda issue. I want
5 to first address Mr. Hilario's statements that he made while
6 being detained on 135th and 12th, and I want to be clear about
7 what the government is seeking to introduce.

8 The government is seeking to introduce the spontaneous
9 statement that Mr. Hilario made. He says: "Can you hand me my
10 money? It's over there, on top of your car." That's at
11 Government Exhibit 301, at time stamp 23:50:10 through
12 23:50:14, and that statement is not in response to any
13 questioning by Officer Smith. It's a purely spontaneous
14 statement.

15 In fact, Officer Smith and other officers had been
16 telling Mr. Hilario to stop talking before he made that
17 statement. And so any argument that there is a Miranda problem
18 with that statement must fail because the statement wasn't made
19 in response to any interrogation, any questioning.

20 And finally, after the post-arrest interview, my
21 understanding is that defense is seeking to suppress that
22 interview on the basis of it being an improper arrest and
23 because, under either framework, the arrest was proper and
24 Mr. Hilario's Miranda waiver was knowing and voluntary, we
25 think that motion should fail as well.

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1 May I have a moment, your Honor?

2 THE COURT: Yes.

3 (Pause)

4 MR. DAVIS: Just stepping back, your Honor, this is --
5 the police in this case did exactly what we would want them to
6 do. They responded to a dangerous situation in three minutes,
7 have the suspects who committed the crime under -- in custody
8 and found the second firearm, and with that, I'll save my time
9 for rebuttal.

10 THE COURT: Thank you very much. Who wants to go
11 first?

12 MS. SHARKEY: I'm going to start, Judge.

13 THE COURT: Okay.

14 MS. SHARKEY: Your Honor, it's our position that the
15 evidence recovered from Mr. Pena violated constitutional norms
16 and should be suppressed. There was either -- there was
17 neither probable cause to arrest. I agree that the government
18 may have been -- or the police may have been allowed to detain
19 Mr. Pena for a brief period of time, maybe. But that initial
20 detention ripened into an arrest, and the items recovered from
21 him should be suppressed.

22 More specifically, your Honor, I'd like to go back and
23 start with Police Officer Doheny. Police Officer Doheny was
24 the initial police officer. He jumped out of the car, he did
25 the chase. He described the shooter as a man with a black

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1 shirt. He didn't see his face, and he gave no description of a
2 do-rag. And he saw him running towards Riverside Drive, and he
3 saw him run into the park.

4 Repeatedly, three different times, at page 11, at page
5 12, at page 19 in the record, Police Officer Doheny said that
6 he lost sight of the shooter at that point. Now, that was an
7 extremely chaotic scene. We know from reviewing the
8 exhibits -- Judge, can I have one second? I need the exhibit
9 list. I'm sorry.

10 (Pause)

11 Judge, we know from the exhibits that were entered
12 into evidence by the government, surveillance video 1 and 2,
13 Exhibits 401 and 402, that there were two shooters at the scene
14 and that shots were flying in multiple directions.
15 Additionally, persons were running in multiple directions, and
16 that came directly from the testimony of Lieutenant Reed.

17 We also know from Defense Exhibit A that there were
18 numerous calls made in to 911 concerning the description of the
19 individuals. And what in actuality happened on 139th, and I'll
20 just point the Court to a couple of things. One call was that
21 they were running north on 139th, running towards 12th. That
22 coincides with what Detective Doheny said. A female caller
23 stated that she saw the PD going the other way and that the
24 perp just ran into a building across the street.

25 Other callers said the perp was wearing a white shirt,

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1 the perp was wearing a red shirt. They were looking for two
2 males wearing masks. Another caller again said later on that
3 they ran into the building on the corner of Riverside across
4 from the location. So I think that does raise the question as
5 which shooter was Police Officer Doheny chasing.

6 It was so chaotic, your Honor, that Police Officer
7 Doheny ran into Riverside Park with his gun drawn and pointed
8 at two individuals, have them come out from the bushes and it,
9 in fact, gives a new meaning to the phrase "Get a room."

10 Now, when Police Officer Doheny arrived at the
11 location where Mr. Pena was detained at 135th Street, he didn't
12 make any identification. He didn't go over and look at the
13 suspects to see if he could identify them, and there was no ID
14 by him. I submit, your Honor, that the scene was more chaotic
15 than the presentation in Court presented.

16 I think it should be troublesome to the Court that all
17 of these officers' body cams were not engaged. Officer Doheny
18 testified that when he ran into Riverside Park, the body cam,
19 that was on the same string as his badge, which Mr. Joyce
20 elicited, fell to the ground, but his badge didn't fall to the
21 ground. He testified later that he recovered the body cam, and
22 there was no damage.

23 I submit that the officers were not only derelict, but
24 they purposefully did not engage their body cams, and I'll get
25 to that in a moment. I'm not saying it was prearranged, but

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1 those officers were trained very soon on the use of the body
2 cams or very close in time to the use of the body cams at the
3 time of this incident, as we heard from this police officer
4 this morning.

5 You heard from Detective Smith that he told the
6 detective who was debriefing the police officers, Detective
7 Carlstrom, on that evening, that the gun was recovered on West
8 138th and 12th Avenue. Police Officer Smith stated that the --
9 you know, that was close to 135th, and the blocks didn't come
10 down. But, respectfully, that doesn't make any sense. That's
11 almost a physical distance of the space of five blocks.

12 So defense's position, to put this in some sort of
13 context, is that there was no probable cause to arrest
14 Mr. Pena, and that if the Court is analyzing this under a Terry
15 analysis, that the investigatory stop morphed into an
16 impermissible stop and subsequent pat-down.

17 We know that when -- and you know this from the body
18 cam of Police Officer Smith that was played at the original
19 session in this hearing, that Mr. Pena -- you could observe
20 Mr. Pena walking towards the police officers with his hands
21 raised, in a black shirt with bright, bright lettering
22 concerning the Philadelphia Pirates --

23 MR. JOYCE: Pittsburgh.

24 MS. SHARKEY: -- Pittsburgh Pirates, forgive me.
25 More, Judge, the government has said that, you know, it was

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1 excellent police work, it's in conformity with constitutional
2 norms because Lieutenant Reed was able to broadcast a
3 description of the individuals within 20 minutes. Well, not
4 so. Because the broadcast by Lieutenant Reed did not match
5 what Mr. Pena was wearing. The shirt was different, as were
6 the sneakers. You know from the officer who testified this
7 morning, he says that the sneakers were black with white
8 stripes. Lieutenant Reed made a big point that the sneakers
9 were -- he was sockless, they were black sneakers.

10 Additionally, counsel for government, AUSA Davis,
11 stated that the black sweater that was recovered and the do-rag
12 were found along the path of the crime. Well, that's not so.
13 If you review the transcript, at page 95, Lieutenant Reed was
14 asked the following -- page 95, line 3 -- question on direct
15 examination:

16 What, if anything, was the significance of those
17 items, referencing the black sweater and the do-rag?

18 Answer by Lieutenant Reed: The black sweater with the
19 writing looked like what I saw on the video.

20 "Q. And, Lieutenant Reed, to clarify, where were those items
21 located when you arrived at the scene?

22 "A. They were on 138th Street, like on a sidewalk by a car."

23 Now, that is similar, not identical, to the location
24 that Police Officer Smith said on the night of the incident the
25 gun was recovered from that location. And, Judge, I would like

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1 to direct your attention to Government Exhibit 506. Do you
2 have it, Judge?

3 THE COURT: Yes.

4 MS. SHARKEY: Okay. 506 depicts 12th Avenue and
5 also -- 12th Avenue going towards 135th, but also the path that
6 goes up to 138. That path is not wide enough to accommodate a
7 car. There's been no testimony that that path is wide enough
8 to accommodate a car. A review of that path up to 138th
9 indicates or shows that it's not wide enough to accommodate a
10 car.

11 And I point that out because Lieutenant Reed had some
12 testimony concerning how he got from 139th to 135th, but at any
13 rate, Judge, the description on which the government is relying
14 as matching Pena, when he was detained for this long period of
15 time, didn't match the description of one of the shooters at
16 the scene.

17 Now, if the Court is analyzing this under the Terry
18 stop analysis, I'd like to point out that my client was in
19 custody, held, was handcuffed and held for 50 minutes prior to
20 being taken from the scene. The government pegs it at 33
21 minutes. I think a review of the original body cam by Officer
22 Smith shows that it's a longer period of time, but at any rate,
23 33 minutes as the context of this case defies constitutional
24 norms.

25 I know that your Honor is -- has great facility with

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1 the law in this area, but the government's justifications for
2 their actions are not appropriate. Our circuit has spoken on
3 whether or not having someone in cuffs for that period of time
4 is or is not appropriate. *U.S. v. Fiseku*, 906 F.3d 65,
5 while -- it was a case before Judge Engelmayer, decided by the
6 circuit, while that endorsed the use of handcuffs on that
7 particular case, talks extensively about how handcuffs should
8 not be the norm and how handcuffs, in fact, are the --

9 THE COURT: Give me the cite again.

10 MS. SHARKEY: 906 F.3d 65.

11 THE COURT: Thank you.

12 MS. SHARKEY: Thank you. That handcuffs are, in fact,
13 the red light, the blinking light that, in fact, a detention
14 has evolved into an arrest. Sister circuits, federal, is *U.S.*
15 *v Acosta-Colon*, 157 F.3d page 9; in our circuit at -- where
16 they utilize language of hallmark of an arrest is *U.S. v*
17 *Newton*, 369 F.3d page 676.

18 Now, Officer Thomas testified this morning concerning
19 the stop that he participated in, and his body camera was
20 turned on more than a half hour, I think it was 33 minutes on
21 the body cam, during his testimony, and you know that he
22 testified that after Mr. Pena was cuffed, there was a pat-down
23 within the first five minutes. And on the 25th -- on the 5th
24 of December 2018, Officer Thomas told counsel for the
25 government that, in fact, on that initial pat-down he got a

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1 wallet and money from the defendant's pocket. And it wasn't
2 until the second time that he was patted down, after 50 minutes
3 or around 50 minutes, that he recovered from the defendant
4 drugs and a sock and a cartridge.

5 I submit, your Honor -- I have no objection to the
6 first pat-down. I do object to the second body search, and I
7 do think that those items should be suppressed. And I just
8 want to point out something to the Court, and I know you're
9 steeped in it, but even if you look at Exhibit 401, which is
10 one of the videos on 39th, I submit that that individual does
11 not look like my client. That individual is much beefier,
12 larger, and I would just request that the Court take that into
13 consideration when deliberating.

14 Now, Judge, I've tried to cover the ground that I
15 think is relevant to the Court's decision, but do you have any
16 questions of me before I cede my time?

17 THE COURT: No, that's very helpful, but you've
18 covered all the areas that I had questions about; so....

19 MS. SHARKEY: Thank you, your Honor.

20 THE COURT: Good. We'll hear from counsel for
21 Mr. Hilario.

22 MS. SHARKEY: Oh, I had one other thing. I wish to
23 adopt any arguments Mr. Joyce raises that I have neglected to
24 raise.

25 THE COURT: Are you sure you want to go out on a limb

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1 and do that?

2 MS. SHARKEY: Oh, I'm totally sure, Judge.

3 MR. JOYCE: And I do the same.

4 THE COURT: Very good.

5 MR. JOYCE: Your Honor, there's an old phrase among
6 defense attorneys that says bad facts make bad law, and what's
7 meant by that is that when you have a situation where the
8 stakes get raised, sometimes certain judges or certain courts
9 seem to be blinded by that. I know this is not the situation
10 in this courtroom, and we're very happy that we're here.

11 But the police on the street seem to think that as
12 well, because when they heard the phrase "shots fired," it's as
13 if the Constitution disappears. And they didn't know who fired
14 the shots. They didn't know which way the shots were, but the
15 police went into a mode, I suggest, your Honor, that said
16 anybody is going to get stopped.

17 And what we know about why motions to suppress are
18 suggested, what we know about the law or this area of the law
19 is that the police are supposed to understand that they can't
20 necessarily benefit from unconstitutional behavior. Now,
21 under, I believe the case is Wong Sung, when the question is
22 whether or not someone is arrested, the question is whether a
23 reasonable, innocent person would believe they were under
24 arrest.

25 I think that that's a case which we can take into

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1 consideration here because we have two people who were in the
2 bushes, who basically were handcuffed at gunpoint, totally
3 innocent people. And so we do know that just about anybody in
4 that area was going to get stopped.

5 The case which Ms. Sharkey cites, Fiseku, does a very
6 good job of putting out the four areas that the Court should
7 examine to determine whether or not a Terry stop has turned
8 into an arrest. First is length of time; next, is it public or
9 private; third, the number of officers that are present;
10 fourth, the risk of danger; and fifth, the level of irons or
11 shackles or handcuffs.

12 And the Court is instructed that they should look to
13 see what was the least intrusive manner in which the police
14 should have acted or could have acted during that period of
15 time of investigation. In this case, Judge, the combination of
16 the little information they had about Richie Hilario and the
17 level of intrusion suggests that all of the evidence that was
18 obtained from him should be suppressed.

19 What we know from Officer Smith is that he heard shots
20 fired, and he heard male, black. Now, later on, he seemed to
21 think he heard other things, right? But what he heard was --
22 I'm sorry, male, black shirt. That's what he heard. And he
23 thinks that there's two people involved because he heard the
24 word "they're."

25 A tremendous amount is made about the direction of

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1 flight, but we know, because we've seen the map, there are many
2 directions of flight when someone goes into Riverside Park at
3 139th Street. And, in fact, when Doheny lost sight, he didn't
4 know if the people went up 138th. He didn't know if they went
5 another path. He had lost sight.

6 So although Officer Smith took a hunch that they may
7 come at one location, that clearly wasn't the only location
8 that a person running down 139th Street could have ended up.
9 But when he sees a single individual, who's not wearing a black
10 shirt, running in his direction, he points his gun at him. He
11 handcuffs him immediately, and he frisks him. When he frisks
12 him, he finds no contraband. Shortly thereafter, he sees
13 another man running, who doesn't have a black shirt on. He had
14 a black shirt, but the gold letters are much more bright than
15 the black shirt, and he stops that individual also.

16 Now, Judge, the government says it's 33 minutes. When
17 you look at whichever body cam it is that Officer Smith has on
18 him, I think it shows that it's much longer than 33 minutes
19 from the time that Mr. Hilario was stopped until he's told take
20 him in. I think it's closer to 45 or 50 minutes, but I will
21 agree that 33 is not enough, and here's the reason why.

22 Because when we hear from Detective Reed, what we hear
23 what he has done is he has decided that he could look at some
24 video -- now, during the period of time, all of the different
25 descriptions that are coming ought, Officer Smith says, I don't

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1 know if I even heard any of them, but they are varied. And as
2 Ms. Sharkey has said, people are going in different directions.

3 But Officer Smith doesn't even know why he's holding
4 Richie Hilario. He's told hold him, just hold him, just keep
5 holding him. And on that radio run, there are a couple of
6 questions like: Are we going to get a show-up? Is anybody
7 going to come and ID this guy? Right? Because they know
8 that's the step that is supposed to take place and very, very
9 tellingly, Officer Doheny, who actually has seen the shooter
10 and maybe the two people running, he goes to the scene where
11 Mr. Hilario was handcuffed, and he's not identified as one of
12 the people who's running away.

13 And they stay and they wait and they wait, and then
14 Lieutenant Reed then does his video review. Tellingly about
15 the video review, your Honor, is this. He never saw
16 Mr. Hilario commit a crime. He was concentrating on the other
17 person mostly, but what he says is he saw the other person
18 pushing Mr. Hilario around. And on direct examination, he made
19 it sound as though he saw Mr. Hilario take something from
20 someone's hand, but on cross-examination, at page 105, he
21 clearly says: No, I didn't see that at first.

22 And I would suggest that only came about at some point
23 later, but why Mr. Hilario was arrested is because he was
24 running away from a scene where a shooting was going on, and as
25 Lieutenant Reed said, he seemed to be pushed around by the

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1 shooter. I suggest those are the reasons why he was arrested,
2 and we know that mere presence with another individual who's
3 committing some crime does not rise to the level of probable
4 cause; so an arrest would be improper.

5 Your Honor, as to the statements that occurred on the
6 street, clearly Mr. Hilario was detained. He was in custody.
7 He was asked a number of questions about where he lived, and
8 there was conversations that were going on. The government
9 says we only want to introduce the one statement about the
10 money, but there was a dialogue that was going on between the
11 officers and Mr. Hilario when there was not probable cause to
12 arrest him. There wasn't reasonable suspicion at that time to
13 continue to detain him. He was not read Miranda, and he was
14 continued to be asked questions.

15 As to the physical evidence, your Honor, the \$120 was
16 never addressed by the police; so I would suggest that they
17 cannot introduce the \$120 evidence at the trial because we had
18 put in issue the fact that \$120 was taken from Mr. Hilario.
19 The evidence basically suggests no one knows where that \$120
20 came from. So I would suggest that the government hasn't met
21 its burden to prove that this -- that the seizure of that
22 evidence was lawful.

23 As to the statements back at the precinct, your Honor,
24 the illegal arrest that occurred on 135th and 12th Avenue is no
25 way attenuated because there's -- again, there's no facts in

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1 this record that would show what would occur that would say
2 Mr. Hilario had committed a crime between the time he was taken
3 to the precinct and the time that the statement was made. And
4 so I think since there is no attenuation, therefore, the lack
5 of probable cause would suggest that that statement must also
6 be suppressed.

7 Finally, your Honor, the length of time was far too
8 long. It was a public place where there were a number of
9 police officers. And when you view the body cam from Officer
10 Smith, you'll see how many cars there were, how many officers
11 there were. The risk of danger, Officer Smith said, he knew
12 after he had patted him down, that he was no longer in danger,
13 and yet, Mr. Hilario was handcuffed and there's an officer's
14 hand on his arm almost the entire either 33 or 50 minutes.

15 And finally, as we said, handcuffs were placed on him
16 immediately and never taken away. In terms of a less-intrusive
17 means, they could have asked Mr. Hilario his address. They
18 could have asked him his name. They could have checked his
19 identification, and they could have released him. And if their
20 investigation then revealed that he was a suspect, they could
21 have arrested him. Thank you, your Honor.

22 THE COURT: Thank you very much. We'll hear finally
23 from the government on rebuttal.

24 MR. DAVIS: Thank you, your Honor. An initial
25 clarification point. When the government was talking about the

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1 33 minutes, what we were talking about is from the beginning of
2 Officer Smith's body cam to the point where Lieutenant Reed
3 first shows up at 135th and 12th. So that's the timeline
4 that's important to the Court's analysis about when probable
5 cause -- the latest point when probable cause could have
6 existed to arrest the defendants.

7 After Lieutenant Reed has seen in the video, after
8 he's shown up and seen the clothes strewn on 12th Avenue and
9 viewed the suspects. While I'm there, I want to talk about
10 Ms. Sharkey said the clothing wasn't found on the path of the
11 suspect. On redirect, Lieutenant Reed clarified that it was
12 found on 12th Avenue, on that path. That's at transcript at
13 112, lines 10 through 23, where Lieutenant Reed drew on the map
14 where he saw the clothing.

15 So let me go one by one on some of these arguments.
16 Ms. Sharkey mentioned Defense Exhibit B as providing a number
17 of alternative 911 calls. There's no record of those calls
18 ever being heard by any of the officers who made the decision
19 to arrest. Indeed, if you look at the time stamps on this
20 document, the first description we see that Ms. Sharkey pointed
21 to, begins at 23:45:07, and Officer Smith's body cam begins
22 with the time stamp of 23:44:06, which shows that those
23 descriptions happened after the stop at issue. And that's
24 consistent with what we heard on Government Exhibit 101, which
25 was the dispatch that the officers were listening to the night

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1 of the arrest and the transcript that they addressed.

2 So Ms. Sharkey and Mr. Joyce spoke about the other
3 stop that Mr. Doheny made en route when he was chasing the
4 suspects, and just quickly on that point, that point shows why
5 there's probable cause in this case as to Mr. Hilario and
6 Mr. Pena because, as to those suspects, Officer Doheny was
7 running in the middle of the night by himself, saw two suspects
8 wearing dark shirts, stopped them, and then realized they
9 weren't the suspects. And why did he realize they weren't the
10 suspects? Because they weren't running. He saw their
11 footwear, and said they couldn't have been running. That's not
12 them, and he let them go. That's exactly what the police
13 should do in that situation. Where it stands in great contrast
14 to the defendants who were running into the exact flight of
15 path down that 12th Avenue.

16 And Ms. Sharkey said that this was -- the officers
17 were somehow purposeful in not turning on their body cams.
18 That's an offensive suggestion. There's no evidence in the
19 record of that. These were officers responding to a shots
20 fired call. Shots were fired on a public street on 139th and
21 Broadway. They were trying to keep the community safe, and to
22 suggest that they were somehow deciding not to put on their
23 body cams as part of some conspiracy is offensive to the great
24 work that was done in this case.

25 I want to address briefly the case law that was cited

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1 about restraints, the *United States v. Fiseku* case, which was
2 decided a few weeks ago by the Second Circuit, I mean, this
3 case demonstrated exactly why restraints were appropriate,
4 appropriately used here.

5 In that case, the Court, as Ms. Sharkey said, held
6 that restraints were appropriate and didn't transform the Terry
7 stop into an arrest and noted that the Second Circuit has
8 repeatedly held that the government can point to circumstances
9 supporting a reasonable basis to think that even an unarmed
10 person could pose a physical threat or flight risk warrants
11 handcuffing.

12 And that, in this case, there was a risk of ongoing
13 and imminent criminal activity that heightened that one or more
14 of the suspects might be armed, and they might attempt to
15 flight or flee. That's exactly our case, your Honor. We have
16 evidence that the two defendants might have been armed. There
17 was a gun nearby, and they had fled earlier in the night.
18 That's why they were stopped.

19 And I just want to note a couple other cases that were
20 cited knew, *United States v. Newton*, in the Second Circuit,
21 this is 369 F.3d 659, approved similar use of restraints during
22 a Terry stop. And in that case, the Court specifically noted
23 that under the circumstances, handcuffing was a less
24 intimidating and less dangerous means of ensuring the safety of
25 everyone on the premises, than holding the defendant at

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1 gunpoint during a search.

2 Again, the court is clear in *Fiseku* itself it says,
3 the court says we shouldn't be second guessing reasonable
4 police work.

5 And then there's the *United States v. Vargas*, which is
6 also in the Second Circuit, decided in 2004. In that case, the
7 officers had reliable information that the suspect was carrying
8 a weapon, and he demonstrated his unwillingness to cooperate.
9 Again, restraint is appropriate.

10 Then there's *Grice v. McVeigh*, Second Circuit in 2017.
11 Officer received a report that an individual matching the
12 description had a remote control device, and handcuffing for 30
13 minutes was upheld.

14 And in *Fiseku* itself again, it was held that it was
15 fine.

16 So moving on from the legal points. As to Officer
17 Thomas' testimony, which Ms. Sharkey spoke about, I would say
18 his testimony today is corroborated by his body cam.
19 Everything he said today is corroborated by what he's shown.
20 Your Honor saw Officer Thomas pull the crack cocaine from
21 Mr. Pena's waistband, placed it on the RMP. Your Honor saw
22 Mr. Thomas return to the RMP after placing Mr. Pena in -- under
23 arrest and placing him in the car. And he discovers the sock
24 with the bullet, and he tells Lieutenant Reed, found a bullet,
25 it was in his pocket, and then he discovers the crack cocaine

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1 and tells Lieutenant Reed, here, I think this is drugs. So his
2 testimony today is corroborated.

3 And as to -- turning to a couple of points that
4 Mr. Joyce made, again, as to the legal points about what the
5 officers were supposed to do. I mean, it can't be that the
6 officers were supposed to see Mr. Hilario and Mr. Pena running
7 down 12th Avenue, shrug their shoulders and let them go. That
8 just can't be the right result here when there's shots fired
9 three minutes prior nearby, and they're running the exact
10 direction of flight reported over the radio. That seems, to
11 me, to be the suggestion of defense counsel as far as the
12 reasonable police action here.

13 I want to address Mr. Joyce's argument about the
14 probable cause as to Mr. Hilario. Your Honor saw the video,
15 and Lieutenant Reed testified that what he noticed that was
16 significant about that video was that Mr. Pena and Mr. Hilario
17 were working together, that those suspects were working
18 together.

19 And in his testimony, he gave a number of reasons why:
20 One, that Mr. Pena seemed to be directing Mr. Hilario; second,
21 Mr. Pena and Mr. Hilario ran off together. They ran in the
22 same direction. After Mr. Pena fires shots eastbound, both he
23 and Mr. Hilario run westbound. So that was significant to
24 Lieutenant Reed's analysis of the video. And then Lieutenant
25 Reed shows up at the -- ten minutes later and identifies them

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1 as the two suspects he saw in the video. That's probable cause
2 to arrest them, your Honor.

3 And as to the \$120, as an initial matter, there is
4 evidence in the record, in Officer Smith's body cam, that that
5 money was found on the ground, not recovered from Mr. Hilario's
6 person. But if the defense is making an argument about a chain
7 of custody or anything else, I think a motion in limine would
8 address that issue, but we do think that that has been
9 addressed.

10 May I have a moment, your Honor?

11 THE COURT: Yes.

12 (Pause)

13 MR. DAVIS: Your Honor, unless you have any further
14 questions, we'll rest on our arguments and the record.

15 THE COURT: Thank you very much. So this was very
16 helpful argument in a very well-trying suppression hearing. I'm
17 very grateful to all counsel.

18 Because we have a trial date, firm and fixed, of
19 February 4th, I need to get you a prompt decision. So I will
20 get you a decision by no later than a week from today, but
21 hopefully even sooner than that.

22 Anything else we need to take up today?

23 Very good. Thanks so much.

24 MS. SHARKEY: Thank you, your Honor.

25 (Adjourned)

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